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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 443

HUGHES TOOL COMPANY

and

RAYMOND M. HOLLIDAY,

Petitioners,

against

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM IN RESPONSE TO REPLY BRIEF FOR PETITIONERS

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This brief rejoinder is tendered in the belief that it will be helpful to the Court in considering the materials newly cited in the reply brief.

A. Petitioners argue that all of the allegations of the complaint are conclusory except those relating to the supplying of aircraft and financing allegedly approved by Board orders (Reply Brief, pp. 2-6).

In this argument petitioners claim that the only conduct alleged in the complaint in other than conclusory form is the consummation of the transactions which were the subject of the Board's transactional orders and that, since

these "dominant facts" are within the province of the Board, the court was without power to act.

The difficulty with this argument is that it is merely a continuation of the practice followed in petitioners' main brief of ignoring allegations they do not like. As the Board recognized in its brief, it is not the aircraft and financing which petitioners did supply to TWA that are alleged to have caused almost fatal injury, but rather the aircraft which were not supplied to TWA, though needed, and the denial to TWA of normal access to aircraft and financing provided by others. (See CAB Brief, p. 16.) This conduct involved not only manipulation of control of TWA so as to aggrandize Toolco's position as a dealer in aircraft, but also, for example, the making of threats to third parties like Boeing and the dissemination to the public of information which was designed to, and which did, depress the market for TWA's securities. It is hard to see how Toolco can imagine that practices of this kind were implicit in the individual sales of equipment or financing arrangements which the Board considered. Nor is it easy to see why we should characterize as "conclusory" an allegation that "defendants caused and directed TWA to forego making any arrangements for the acquisition, by sale, lease or otherwise, of any jet-powered aircraft" (Complaint, ¶17; A-12) or other similar allegations.

Since petitioners' factual premise is wrong, the authorities cited (Reply Brief, pp. 4-6) are irrelevant. *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U. S. 474 (1932), unlike this case, was a case in which the conduct complained of was a combination and conspiracy among steamship lines clearly subject to sanctions under the Shipping Act, and which had at its root an alleged agree-

ment among the carriers which was subject to filing with, and approval by, the Shipping Board under that Act. In *Luckenbach S.S. Co.* v. *United States,* 179 F. Supp. 605 (D. Del. 1959), *aff'd in part,* 364 U. S. 280 (1960), the unlawful conduct alleged was a below-cost reduction in railroad rates. The case thus fell precisely within the rule of cases like *Keogh* v. *Chicago & N.W. Ry.*, 260 U. S. 156 (1922), and *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), discussed at page 97 of TWA's main brief. Moreover, in the *Luckenbach* case the complained-of rates were entered into by the defendant railroads pursuant to collective rate-making agreements specifically approved by the Board and exempted from the antitrust laws pursuant to Section 5a of the Interstate Commerce Act, 49 U.S.C. §5b.* In *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 102 F. Supp. 685 (S.D. Cal. 1952), *aff'd*, 209 F.2d 380 (9th Cir. 1953), the District Court held that the Federal Power Commission had primary jurisdiction because the substance of plaintiff's complaint was that defendant had failed to file a tariff with the Commission and had failed to transport plaintiff's gas through its pipeline. The Court of Appeals affirmed principally on the grounds that a tariff had in fact been filed and that defendant had committed virtually its entire pipeline capacity to others in a contract on file with, and approved by, the Commission. Again, since the conduct related entirely to rates and tariffs fully

*This also differentiates the *Luckenbach* decision from this Court's ruling in *Georgia* v. *Pennsylvania R.R.*, 324 U. S. 439 (1945) (TWA's Main Brief, pp. 93, 95), which was decided before the enactment of Section 5a. Section 5a was added by 62 Stat. 472 (1948). The purpose of the new section was to permit the approval by the Interstate Commerce Commission of agreements which might otherwise be unlawful under this Court's ruling in *Georgia* v. *Pennsylvania R.R.*, *supra*. See 1948 U. S. Code Congressional Service, pp. 1844 *et seq.*

regulated by the Commission, the need for primary jurisdiction was clear.*

B. Petitioners argue that Toolco is not an aircraft supplier and that the only conduct complained of relates to the furnishing of financing and aircraft by Toolco to TWA (Reply Brief, pp. 7-10).

Insofar as this argument (again ignoring the complaint) contends that the only conduct alleged is Toolco's supplying of aircraft and financing to TWA, it has been previously answered in this brief and elsewhere. As has been noted, the source of the injury was not the furnishing of some equipment and financing to TWA but rather the preclusion of TWA from sources of these items, in furtherance of the over-all anti-competitive program alleged.

Insofar as the argument contends that only the supplying of aircraft to TWA is involved and that Toolco is

* The quotation from Von Mehren, *The Antitrust Laws and Regulated Industries: the Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 943-45 (1954), set out at pages 5-6 of the Petitioners' Reply Brief, is, when read in context, unrelated to any problem posed here. It is a part of a discussion by Professor Von Mehren of the situation where an antitrust plaintiff urges that a court should consider his claim because, while the administrative agency has jurisdiction over it, the practice alleged "is necessarily illegal even if judged by the standards of the regulatory statute . . ." Whether or not that is true of Toolco's conduct, it is not a contention now presented to this Court, nor one with any application to the present issues. Petitioners also distort the teaching of the *Isbrandtsen and Far East Conference* cases by confusing the chronology of those decisions (Petitioners' Reply Brief, p. 6, note). The *Far East* case, which came first, held that a complaint alleging the illegality of a dual-rate contract among steamship companies must be dismissed because the agreement was one required to be filed with the Shipping Board and which, if approved would be exempted from antitrust prosecution. *Subsequently*, in *Isbrandtsen*, this Court upset the Board's approval of the dual rate agreement on the ground that, *under the standards of the Shipping Act*, the agreement was unlawful. The Court had no occasion to consider whether, after the Board's approval had been struck down, an antitrust suit might be maintained. In the *Far East* case, however, the Court had previously indicated that "a similar suit [*i.e.*: similar to the antitrust suit] is easily initiated later, if appropriate." (342 U. S. at 570)

not a supplier of aircraft generally, it again rests on the technique of ignoring allegations and facts which do not fit petitioners' pattern. Thus, when petitioners say that the complaint contains "no allegation that Toolco has sold or leased any aircraft to any air carrier other than TWA" (Reply Brief, p. 8), they completely ignore the complaint's allegation that Toolco "was and is engaged * * * since in or about 1939 in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft *to air carriers* in various other states for use in interstate and foreign commerce" (Complaint ¶3, A-2).

Annex A is an extraordinary attempt to induce the Court to decide this case on the basis of the petitioners' claims as to the facts. But these petitioners are defendants who deliberately defaulted before plaintiff could develop or prove its case. Statement after statement in Annex A is not merely disputed by TWA but flatly contradicted by the allegations of the complaint. TWA stands on the complaint. At a trial, with proper testimonial and documentary discovery, TWA would have been prepared to prove it. Unless a wilful default is now to become a new and superior method for defendants to secure a summary judgment in their favor even though the facts are in dispute, on the present record the complaint must be accepted as true.

Even petitioners' own argumentative restatement of the facts reveals inescapably the real reach of Toolco's activities. One wonders, for example, what is meant in Annex A (p. 13a, note) by the suggestion that Toolco's attempts at joint ventures with foreign manufacturers "would have had the obvious result of injecting a new element of competition among the then present manufacturers of commercial transport equipment." If this comment is meant to allay suspicion that Hughes had grand designs in the

fields of aircraft manufacture and supply in which he used his leverage over TWA, it seems extraordinarily ill-adapted to that purpose. Nor is one disposed to regard a full factual investigation, including the examination of Mr. Hughes, as less necessary because of petitioners' argument (Reply Brief, pp. 14a-15a) that, although Hughes barred TWA from negotiating with Boeing, this might have been because Hughes feared Boeing might develop a plane which could be used by TWA's competitors (or, perhaps, which might have been sold in competition with the planes committed for by Hughes). In the same category is the argument that Hughes' instructions to TWA not to deal with Douglas can somehow be explained by statements that Hughes wanted Douglas to "approach him initially" and "Douglas did not want to deal with Hughes" (Reply Brief, p. 15a).

Nor do petitioners dispose of the question whether Toolco is a supplier of aircraft by tabulating, in the tables printed at page 10 of their brief, information gleaned from Form 41 reports filed with the CAB. Those reports may reveal the manufacturer from which planes originated, but they contain no information at all as to the special arrangements under which aircraft ordered by one customer were in fact delivered to another. Admittedly such diversions were commonly employed by Toolco in its activities in supplying aircraft to TWA, as well as Pan American and Northeast. Petitioners' tables completely obscure the facts of these transactions, by the use of some, but not all, of the information on the Form 41's, and by a selective supplementation of that information.

The evident fact is that, even if this case could be disposed of by holding Toolco not to be a dealer in aircraft—and it plainly cannot—no such finding could properly be made on this record and at this point in these proceedings.

C. Petitioners argue that Congress intended to immunize from antitrust prosecution "assistance" given an air carrier by one controlling it and (apparently) that, since Toolco has "assisted" TWA, it is entitled to exemption (Reply Brief, pp. 11-16).

Petitioners' argument that antitrust exemption was intended by Congress as a reward to persons public-spirited enough to acquire control of "fledgling" airlines and help them on their way is impossible to square with Congress' evident concern that competition be preserved and antitrust policy displaced to the minimum extent possible. (See Respondent's Main Brief, pp. 82-92.) There is, of course, no support either in the statute or in the legislative history for petitioners' view.

Nor does petitioners' citation of TWA's record of growth, during a time when the industry as a whole was growing from infancy to maturity, answer the point. This facile comparison of figures of course glosses over the concern expressed time and again by public officials as to the harm done TWA by petitioners' practices and policies. (See, *e.g.*, Respondent's Main Brief, pp. 13, 14, 33-34, 35-36, 55-56.) It also ignores even petitioners' own assertion elsewhere that TWA was damaged to the extent of at least $45,000,000. Moreover, if petitioners' reference to TWA's progress were relevant, it should also be noted that since early 1961, when independent management took charge of TWA, the company's growth has been extraordinary—so much so that during these four years the value of Toolco's investment in TWA has increased by well over $250,000,000.

More important, of course, is the fact that to whatever extent Toolco may or may not have helped TWA, it was not thereby licensed to violate the antitrust laws and petitioners' argument, whatever its merit, is absurdly irrelevant.

Picking their way carefully from one absurdity to another, petitioners next suggest that because Congress referred in Section 414 of the Federal Aviation Act to all of the antitrust laws instead of referring only to Section 7 of the Clayton Act, it must have intended to exempt conduct other than an acquisition of control (Reply Brief, p. 15). This, of course, overlooks, in an appealingly naive and ingenuous way, the obvious fact that an acquisition of control may be attacked under antitrust provisions other than Section 7,* so that a reference to all of the antitrust laws was, in any event, necessary.

D. Petitioners argue that the Board had the power to regulate "every aspect" of the control relationship and that the Board did so (Reply Brief, pp. 16-22).

Most of what petitioners say in this portion of their brief has been said and answered before and need not be answered again. It is worth noting, however, that while petitioners say that the purpose of the Board's approving Toolco's acquisition of control conditionally was "to afford the Board continuing control and surveillance over Toolco's dealings with TWA", the Board itself takes a more limited view, assigning as the reason for the condition its "concern that Toolco might force TWA to purchase more aircraft than its operations required" (CAB Brief, pp. 15-16).

The principal fallacy in petitioners' argument that no "secret, unreported transactions between Toolco and TWA" are alleged and that, therefore, whatever transactions exist must have been approved, is that most of the matters alleged in the complaint are not "transactions between Toolco and TWA", at least not in the sense contemplated by the condition in the Board's approval order. It was not a transaction "between TWA and Toolco"

* For example, under Section 1 of the Sherman Act, *e.g.*, *United States* v. *Southern Pacific Co.*, 259 U. S. 214 (1922).

involving more than $200 when Toolco barred TWA from dealing with Douglas, nor was such a transaction involved when Toolco threatened Boeing. This conduct was indeed "secret" from the Board and could be kept so, in part, because there was no statutory requirement and no requirement of the Board that it be reported. As the Board observes, this conduct "was, of course, neither submitted to nor approved by the Board, and it was certainly not necessary to carry out any of the Board's orders" (CAB Brief, pp. 16-17). The same thing is true as to the dealings which Toolco had with various aircraft manufacturers, and with air carriers other than TWA and, in recent years, Northeast.

Petitioners again profess to be "shocked" at TWA's "denigration" of the Board's transactional orders (Reply Brief, p. 19). The Board apparently does not regard these orders as denigrated, however, since it describes them just as TWA does (See CAB Brief, p. 4). The plain fact is, and professions of "shock" will not change it, that the Board's orders were issued in non-adversary proceedings and on a meager record, and no comprehensive investigation was made of activities of Toolco not voluntarily disclosed in the brief applications.

E. Petitioners argue that, even though the Board may not award damages, the court is without jurisdiction to entertain a suit seeking that form of relief (Reply Brief, pp. 21-27).

Arguing that "the orders of the Board have exempted the conduct of which TWA complains from the operation of the antitrust laws" (Reply Brief, p. 22), petitioners conclude that relief in damages, as well as injunctive relief, is barred. If the premise were sound, the conclusion would follow. The Board, however, does not believe such conduct has been exempted (CAB Brief, pp. 14-18), and neither does TWA (Respondent's Main Brief pp. 105-23).

Petitioners go on to urge that, even if their conduct has not been exempted, a prayer for damages may not be entertained since the conduct complained of relates "to matters within the regulatory regime of the Board." The complaint clearly relates to matters outside the regulatory regime of the Board, and the Board has so recognized (CAB Brief, pp. 11-14). But even if these matters were within the "regime" of the Board, it does not follow that the remedy of damages would be proscribed.

In this connection petitioners painstakingly overlook this Court's ruling in *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 317 U. S. 84 (1962), previously cited in their main brief (pp. 62, 85). The *Hewitt-Robins* case makes clear that damages may be awarded by a court even in an area where the agency has some primary function to perform. (See Respondent's Main Brief, pp. 102-03.)

The decisions cited by petitioners are not to the contrary. The distinguishing features of the *Cunard, Interstate Natural Gas*, and *Luckenbach* cases have been noted above. In view of the grant of certiorari on March 1, 1965, this Court will, of course, review the decision in *Carnation Co.* v. *Pacific Westbound Conference*, 336 F.2d 650 (9th Cir. 1964), (Reply Brief, p. 23). It is sufficient here to note that the decision below in that case was based on the fact that the agreement complained of was one required to be filed with the Federal Maritime Commission and subject to exemption by the Commission from the antitrust laws and that the Commission also had full authority to grant reparations.*

* The decision in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), depended on considerations peculiar to the effectuation of federal labor policy and the relation of state law to federal law and has no relevance here.

CONCLUSION

For the reasons stated in this brief and in Respondent's main brief, it is submitted that the judgment of the Court of Appeals should be in all respects affirmed.

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